IN THE

Supreme Court of the United States

No. 84-616

October Term, 1984

EDWARD R. MULROY, d/b/a MULROY DAIRY FARMS,

Petitioner,

-vs.-

JOHN R. BLOCK, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

CARROLL, CARROLL, BUTZ, STORINGE & YOUNG
John Benjamin Carroll, Esq.
Of Counsel
Attorneys for Petitioner
White Memorial Bldg., Ste. 206
100 East Washington Street
Syracuse, New York 13202
(315) 474-5356

TABLE OF AUTHORITIES

Page

Supreme Court:

Page

Circuit Courts:

District Court:

IN THE

Supreme Court of the United States

No. 84-616

October Term, 1984

EDWARD R. MULROY, d/b/a MULROY DAIRY FARMS,

Petitioner,

-vs.-

JOHN R. BLOCK, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

The Petitioner, in reply to the Government's Memorandum in Opposition, directs the Court's attention to the following:

1. The answering Memorandum admits that the contested capital assessment was passed in violation of the substantive and procedural requirements of the Congressional Budget and Impoundment Act of 1974 (see Opposition Memorandum at page 3, number 2), by the exercise of a retained congressional power to cancel that law at will, commonly called a "legislative veto". The reason advanced for the legality of the "veto" is that the matter

involves internal congressional substantive and procedural matter and thus is exempt from the rule announced in *INS v. Chadha* 103 S.Ct. 2764. (See Opposing Memorandum, page 4). *Chadha* (supra) however, recognized that internal powers of Congress become externalized and lose their internal character when other branches of government cojoin with Congress in legislation. All congressional powers originate as internal powers. They become external and binding when they become law. In this regard *Chadha* (supra) held: "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked[19]".

That interpretation has since been faithfully followed in *Consumer Energy Council of America v. FERC* 673 F 2d 425 D.C.Cir. 1982; *American Federation of Government Employees of AFL-CIO et al. v. Pierce* 647 F 2d 300 D.C.Cir. 1983; see also *Kennedy v. Sampson* 511 F 2d 430 D.C.Cir. 1979.

The Opposing Memorandum claims that the legislative veto was cured by subsequent enactment legislation i.e. 1983 Dairy and Tobacco Adjustment Act, containing a validation clause. That is in error in two respects. First, there is a savings of monies collected clause, not validation, and second, the 1983 Act was likewise passed by exercise of a legislative veto and is being contested on that ground in the District Court of the District of Columbia, (*Kreeger Farms v. Block et al.*).

Certiorari is thus needed to conform this case to the *Chadha* (supra) decision.

2. The Petitioner has standing to sue against a legislative veto as a directly affected person as well. *INS v. Chadha* (supra) directly so held at page 2776. All other circuits considering the question have also so held. (See Petition, page 12). Certiorari should issue on this point to enforce prior decisions of this Court and to so conform the rule in the Second Circuit.

The "enrolled bill doctrine" relied on by the Opposition Memorandum as a further ground to deny the petitioner's standing to enquire into the exercise of the legislative veto, evolved in

the middle and late 1800's. It does not appear to have been applied by any Court in over fifty years. During that time the whole law of standing has evolved. It is plain that without explicit reference to the doctrine, that doctrine has been impliedly overruled in the course of the evolution of standing, *Vander Jagt v. O'Neill* 699 F 2d 1166, 1170 (D. of Col. Cir.); see page 1 infra). Even when the "enrolled bill doctrine" was followed it had engrafted in to it an exception not followed in this case by the Lower Court . This allowed a suit by a directly affected private citizen. (See *United States v. Ballin* 144 US 1, 5).

Certiorari should therefore issue to apply that exception to this case and to clarify the applicability in the present legal world of the "enrolled bill doctrine".

4. The Government's Memorandum in support of its burden of proof to show jurisdiction to regulate intra state commerce (*United States v. Bass* 404 US 3363) urges the following facts upon this Court: (1) "all" producers were benefited by the program, (Memorandum, pages 4 & 5); (2) Petitioner's milk prices at retail for pasteurized products were supported by the wholesale program for raw milk producers, (Memorandum, page 6) and (3) that a substantial impact upon interstate commerce is made by the Petitioner's class volume of 1%, (Memorandum, page 6).

The Petitioner's expert emphatically denied the above assertions, and stated that the petitioner's class was not benefited; nor did it have any adverse impact on the program.[1] That expert specifically denied any retail price benefit to the Petitioner.[2]

---

[1] Petitioner's Appendix pages 36-41, 43.

[2] "The Price Support Program is so far removed from the retail price level, where the producer-handler operates, as to render the effect of the program in terms of benefits so negligible as to be immeasurable. The producer-handler is able to create his own demand by supplying fresh milk from a close local source of supply. "
(Petition, appendix page 37) (see also page A43).

This occurs because the government price support is aimed at the price paid farmers who sold raw milk to milk processors, a level that has no economic relevance to the Petitioner's class who only sold pasteurized milk at retail to the public.

Not even the Government expert contended the 1% of commerce of the Plaintiff's class was any part of the problem. He assumed that commerce and was only concerned with an increase.

Thus, there was a square issue of fact before the Lower Court should it decide to credit those assertions, and no assertion of one claim made here on impact.

That the fact issues were genuine and material is obvious.

It is well established by this Court that on a Summary Judgment motion, the District Courtt cannot weigh the credibility of evidence (*Agosto v. Immigration and Naturalization Service*, 436 US 748, 98 S.Ct. 2081). Nor may evidence be weighed by the District Court, (*Cox v. American Fidelity Casualty Co.* 1947 CA 9th 249 F 2d 616; *Storen v. American National Bank and Trust Co.* (1976) CA 7 Illinois 529 F 2d 1257). Summary Judgment cannot be granted on an issue where reasonable men could differ, *United States v. Diebold, Inc.* 369 US 654, 82 S.Ct. 993.

Since the Petitioner attacked the constitutionality of the statute on its face, and also as applied, and genuine issues of fact existed, certiorari should issue in the interests of justice and to conform the Second Circuit to the settled law of this Court and other circuits on Summary Judgment.

5. The cases of *National Cable Television Ass'n. v. United States* 415 US 336, (1974), *FPC v. New England Power Co.* 415 US 345 (1974), *National Cable Television Ass'n. v. FCC* 554 F 2d 1094 Dist. of Col. Cir. (1976) involved an exercise of the commerce power to regulate CATV and Electrical Power in aid of which an assessment to fund the cost of that commerce regulatory program was levied. The Court said, if the fee exceeds benefit conferred, it becomes a tax.

These cases indicate the commerce power cannot be called on to avoid the constitutional limitations of the taxing power and thus to read these limitations out of the Constitution.

Stated differently, *the test is the effect of the levy, not the power called on,* as was stated by this Court in *United States v. Ptasynski* 103 S.Ct. 2239, 2242.

To date, some Lower Courts have been led in an opposite direction by a holding in *Rodgers v. United States* 138 F 2d 992 (6th Cir. 1943) to the contrary. There that circuit relying on the *Head Money* cases (112 US 580)[1] held that the sole test for the nature of an assessment is the mental purpose and/or stated purpose of Congress, i.e. revenue or regulation.

Other Courts have been led in the opposite direction to the Cable T.V. and power cases (supra) by *Wickard v. Filburn* 317 US 111, an early 1940 decision, made in an agricultural setting, in which there was no indication that there are any constitutional tax restrictions on penalties levied under the commerce power. The issue of an excise tax was not raised or discussed therein, but the decision has cast a long shadow.

Thus, at the present time, if one is an owner of a Cable T.V. station, or a stockholder of an electrical utility, one can claim the constitutional restraints of the taxing power against commercial assessments of a tax like nature. However, if one is a farmer, one does not have the privilege of these constitutional protections.

It is respectfully submitted no Court, other than this Court, can reach and settle these questions of the constitutional interrelationship of these powers.

This is a proper case to reach the issues. It presents the outer most bounds to date of the assertion of such a power by Congress.

---

[1] The Government Memorandum likewise relies upon the *Head Money* cases as does *Rodgers* (supra). The later case of *Pollack v. Farmers Loan Trust Company,* 158 US 601 appears to have abandoned the *Head Money* rationale, so that *Rodgers* (supra) is now seriously out of date.

It is clear, beyond any question, that the assessment, which is levied upon the act of sale, and whose monies are used to fund the program, is in fact an excise tax, as such taxes have been defined by this Court - in *Knowlton v. Moore* 178 US 41, 88, i.e. "burdens with reference to the art of manufacturing them or selling them," and as they were known to the Constitutional Convention.

Here the levy is on account of a sale at retail in intrastate commerce. The bill is entitled Budget. The problem to be resolved was revenue to pay for the growing expense of the program. The money was in fact used to offset Treasury outlay. Not one commerce finding was made in the overall program or in the assessment legislation.

There is no question that it is a direct levy operating to fund a general public interest program, in which cheese is given away, and free school lunches provided, and the foreign policy of the United States pursued, all pursuant to express congressional findings, of national defense and general welfare all funded by this levy which is levied upon one segment of the public only.

Resolution of the constitutional issue will determine the legality of the assessment since the act delegated to the Secretary a non-delegable function i.e. the decision to tax or not tax.[4]

Accordingly, certiorari is necessary to clarify and fix the proper role of the Constitution in this process.

All points heretofore urged are repeated.

---

[4] The delegation is made upon the finding of certain levels of production. There are *no* standards on the actual exercise of the power; see the *Cable T.V. and Power Case* (supra).

Respectfully submitted,

John Benjamin Carroll, Esq.
Office and Business Address
The White Memorial Building
Suite 206
100 East Washington Street
Syracuse, New York 13202
(315) 474-5356